(3)

No. 04-742

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN DOE,
on behalf of himself and all others similarly situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL TREASURY EMPLOYEES UNION, *ET AL.*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARK D. ROTH
General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, NW
Washington, DC 20001
(202) 639-6415

SUSAN TSUI GRUNDMANN
General Counsel
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, FD1, IAMAW, AFL-CIO
1016 16th Street, NW
Washington, DC 20036
(202) 862-4457

GREGORY O'DUDEN *
General Counsel

BARBARA A. ATKIN
Deputy General Counsel

LARRY J. ADKINS
Deputy General Counsel

ROBERT H. SHRIVER, III
Assistant Counsel
NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, NW
Washington, DC 20006
(202) 572-5500

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
A. The Appeals Court's Decision Impermissibly Authorizes Federal Agencies To Exempt Themselves from FEPA	3
B. The Appeals Court's Decision Forces Employees To Choose Between Either Working Without Pay or Engaging in Insubordinate or Unprofessional Conduct by Refusing To Work Beyond Their Regularly Scheduled Tour of Duty	7
C. The Appeals Court's Legal Errors Have a Substantial Impact on the Civil Service	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
Adams v. United States, 162 Ct. Cl. 766 (1963)	6
Aletta v. United States, No. 99-758 C (Fed. Cl.)	2
Anderson v. United States, 136 Ct. Cl. 365 (1956)	5, 6
Doe v. United States, 372 F.3d 1347, *reh'g and reh'g en banc denied*, 67 Fed. Appx. 596 (Fed. Cir. 2004)	*passim*
Fix v. United States, 368 F.2d 609 (Ct. Cl. 1966)	6
Jackson v. Department of Justice, 96 M.S.P.R. 498 (2004)	7-8
OPM v. Richmond, 496 U.S. 414 (1990)	4-5
Rapp v. United States, 340 F.2d 635 (Ct. Cl. 1964)	6
Schweiker v. Hansen, 450 U.S. 785 (1981)	4-5
United States v. Hodson, 77 U.S. 395 (1870)	5
STATUTES AND REGULATIONS	
5 U.S.C. § 1212	9
5 U.S.C. § 4303(e)	9
5 U.S.C. § 7512	8
Fair Labor Standards Act, 29 U.S.C. § 207	6
Federal Employees Pay Act of 1945, 5 U.S.C. §§ 5541-5550a	2
5 U.S.C. § 5542(a)	3
5 C.F.R. § 550.111(c)	3
MISCELLANEOUS	
H.R. Rep. No. 79-726 (1945)	3
SEC, Personnel Operating Policies and Procedures, Ch. 630.B.4.A.1	10

IN THE

Supreme Court of the United States

No. 04-742

JOHN DOE,
on behalf of himself and all others similarly situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL TREASURY EMPLOYEES UNION, *ET AL.*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS* [1]

The National Treasury Employees Union ("NTEU"), the American Federation of Government Employees, AFL-CIO ("AFGE"), and the National Federation of Federal Employees, IAMAW, AFL-CIO ("NFFE") (collectively, "the unions") are the three largest federal sector labor organizations. Together, the unions are certified as the exclusive bargaining representatives of more than 800,000 federal employees nationwide. This case concerns overtime pay for

[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of this Court. This brief was drafted exclusively by NTEU counsel.

federal government employees under the Federal Employees Pay Act of 1945, 5 U.S.C. §§ 5541-5550a ("FEPA"), an issue of vital importance to the unions and their members.

The unions have a great deal of experience with overtime practices under FEPA. Accordingly, they are uniquely situated to apprise the Court of the practical significance of the appeals court's decision. Moreover, the outcome of this petition will have a direct effect on a lawsuit pending in the United States Court of Federal Claims where NTEU is representing a class of attorneys employed by the Internal Revenue Service who are seeking FEPA overtime compensation. *Aletta v. United States*, No. 99-758 C (Fed. Cl.). Briefing on the merits in that case has been suspended in light of the petition for a writ of certiorari filed in this action.

SUMMARY OF THE ARGUMENT

The decision by the court of appeals permits an overtime compensation evasion scheme totally at odds with FEPA, a federal statute with broad applicability. It validates the Justice Department's ("DOJ") interpretation of an Office of Personnel Management ("OPM") regulation that allows federal agencies to escape their statutory obligation to pay overtime simply by adopting a self-serving policy of withholding written approval for any overtime, no matter how necessary. In other words, the appeals court's decision permits agencies to exempt themselves from FEPA's mandatory overtime obligations, contrary to the broad coverage rules contained in the text of that Act.

As a result of the appeals court's decision, federal agencies are free to take advantage of their professional workforce by requiring employees to work overtime without compensation. Federal employees who have been verbally ordered to work overtime or who have more work than can reasonably be completed in the regular workday are forced to "volunteer" their services for any time worked beyond an 8-hour day or

40-hour workweek. As a practical matter, they have no option but to work the additional time, and any suggestion to the contrary defies credulity. By validating DOJ's interpretation of the OPM regulation, thereby limiting overtime payment to instances where approval was in writing, the court of appeals has opened an enormous loophole in the statute's mandatory overtime provisions.

The appeals court's legal errors warrant the granting of the petition for a writ of certiorari. Nearly one million federal employees rely on FEPA for their overtime compensation. For five decades, they have been able to recover overtime compensation for time their agencies induced them to work, regardless of whether there was a written order or formal approval for the overtime. Those settled expectations have been undone. An important statutory benefit of federal employment—a guarantee of overtime pay for performing work that is necessary to the job—has been effectively eliminated by judicial fiat. This Court's intervention is required to rectify the appeals court's profound error.

ARGUMENT

A. The Appeals Court's Decision Impermissibly Authorizes Federal Agencies To Exempt Themselves from FEPA.

FEPA was enacted to provide "for extra payment for overtime services, whenever such services are required by the necessities of government." H.R. Rep. No. 79-726, at 2 (1945). Under FEPA, federal employees are entitled to compensation for overtime hours worked that are "officially ordered or approved." *See* 5 U.S.C. § 5542(a).

An OPM regulation provides, however, that overtime under FEPA is only compensable if it was ordered or approved in writing by an official to whom authority to approve overtime has been delegated. *See* 5 C.F.R. § 550.111(c). The

appeals court construed that regulation to mean that there is never any obligation to provide compensation if the order or approval is not in writing from an appropriate official. The denial of compensation does not, of course, mean that the employee is excused from working the overtime. Rather, under the appeals court's decision, the employee has no choice but to work without compensation, even if the agency officials deliberately withhold a written order or approval. *See Doe v. United States*, 372 F.3d 1347, 1363, *reh'g and reh'g en banc denied*, 67 Fed. Appx. 596 (Fed. Cir. 2004).

Under a best-case scenario, the regulation leaves it to the whim of high-level agency managers to decide if and when to authorize compensation under FEPA for mandated overtime; whether compensation is available turns entirely on whether the manager chooses to provide a written order or approval. The scenario in this case is even worse: DOJ has determined, as a matter of policy, that its officials are *never* to issue a written order or approval for overtime. It has thus exempted itself from FEPA's mandatory overtime requirements, regardless of its need for overtime work. *See Doe*, 372 F.3d at 1364. Because the appeals court's construction of the regulation permits agencies to subvert the statute entirely, as DOJ has done here, the regulation cannot be valid.[2]

---

[2] Under the appeals court's decision, the regulation functions as an escape valve available to the very federal agencies on which FEPA places obligations. That is, the decision allows any agency to evade its FEPA overtime pay obligations by choosing to withhold written approval, no matter the circumstances giving rise to the overtime work. Thus, as discussed at length in the petitioners' brief (at 16-18), this case is distinguishable from *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *OPM v. Richmond*, 496 U.S. 414 (1990), the two cases that the appeals court found to be controlling. *See Doe*, 372 F.3d at 1355-57. In those cases, this Court held that individuals who received improper advice from an agency were not excused from following the prescribed statutory procedures for vindicating their rights. There, the power to satisfy the procedural requirements at issue rested entirely with the individuals seeking

Indeed, the pernicious effect of the appeals court's interpretation of the regulation is amply illustrated by two basic examples: (1) a DOJ employee would have no right to overtime compensation even if the Attorney General called the employee on a Saturday, gave him or her an assignment, and orally directed the employee to complete it by Sunday night; and (2) an attorney who received a written order from a court at the end of his or her work day requiring a response to an emergency filing by 9 a.m. the next day would have no right to overtime compensation for time spent working on the response absent a written order from someone in the upper management ranks (an order that, at DOJ, would not be forthcoming). These examples, countenanced by the appeals court's decision, run directly counter to FEPA's clear language and Congress' intent.

The appeals court acknowledged that five decades of precedent hold that agencies may not negate FEPA in this manner. *See Doe*, 372 F.3d at 1352-54 (citing, *e.g.*, *Anderson v. United States*, 136 Ct. Cl. 365 (1956)). The DOJ attorneys who make up the class—who are presumed to have known the state of the law, *see United States v. Hodson*, 77 U.S. 395, 409 (1870)—therefore had no reason to think they would be barred from subsequently seeking overtime pay for any time they were required to work, even if the overtime was not officially ordered or approved in writing. Rather, it was clearly settled that they had a right to seek compensation later

---

government benefits, and not with the government agencies that were to pay out those benefits. Thus, unlike *Hansen* and *Richmond*, where the plaintiffs could have investigated their legal rights and themselves taken whatever action was necessary to vindicate them, there was *nothing* the class members here could have done to vindicate their statutory rights. Instead, they had to rely on high-level managers to issue the required written authorization, which was never forthcoming because of DOJ's blanket policy to withhold such authorization.

for all necessary overtime work, no matter how the need to work the overtime was communicated to them. *See Doe*, 372 F.3d at 1354.

It is incomprehensible that Congress would enact a law establishing special overtime rules for federal employees (which now apply to nearly a million federal employees not covered by the Fair Labor Standards Act, 29 U.S.C. § 207), and then allow OPM to grant agencies the authority to nullify that law and upset the settled expectations of the employees who are subject to it. If every agency interpreted the OPM regulation as the court of appeals did and adopted DOJ's blanket policy of withholding written authorization for overtime pay, the law would be totally stripped of all meaning.

The appeals court's decision condones DOJ's usurpation of Congress's role by interpreting the OPM regulation as creating a gaping loophole in FEPA. *See Doe*, 372 F.3d at 1354-62. Its holding frustrates the statutory mandate, set forth unambiguously in FEPA, that the government *must* pay employees for overtime worked to carry out the necessities of government. If the appeals court has correctly interpreted the OPM regulation to permit DOJ's subversion of this statutory purpose, the regulation is invalid, as repeatedly held by the Federal Circuit's predecessor. *See, e.g., Anderson*, 136 Ct. Cl. at 371; *see also Fix v. United States*, 368 F.2d 609 (Ct. Cl. 1966); *Rapp v. United States*, 340 F.2d 635 (Ct. Cl. 1964); *Adams v. United States*, 162 Ct. Cl. 766 (1963). Moreover, even if the regulation is not facially invalid, it is clear that DOJ has violated FEPA by withholding the required written authorization in instances where attorneys have been compelled to work to meet the necessities of government. The appeals court's sanctioning of DOJ's conduct, therefore, is legal error.

B. The Appeals Court's Decision Forces Employees To Choose Between Either Working Without Pay or Engaging in Insubordinate or Unprofessional Conduct by Refusing To Work Beyond Their Regularly Scheduled Tour of Duty.

The petitioners are correct that the appeals court's ruling, as a practical matter, empowers federal agencies to require employees to work overtime without compensation. *See* Pet. Br. at 14. Under the appeals court's decision, federal employees who are directed to work overtime are placed in the untenable position of telling their supervisors to "put it in writing" if they want to be compensated. If their supervisor declines to do so—whether pursuant to a formal policy, as at DOJ, an informal practice, or a whim—the appeals court's decision means that the employees will have to work the overtime without compensation.

The appeals court's passing suggestion that employees can simply decline to work uncompensated overtime (*see Doe*, 372 F.3d at 1364) is pure fantasy. The predicament of the class members in this case illustrates the absurdity of this suggestion. As the record reflects, DOJ demands that its attorneys represent the United States vigorously and professionally and holds them to the highest legal standards. Satisfying these demands and expectations, responding to court-mandated schedules and judges' orders, conducting trials, working with witness schedules, and case-related traveling all mean that the class members cannot simply stop working at the end of their tours of duty. To do so would be to fail to live up to the standards to which all DOJ attorneys are held.

The appeals court acknowledges that adverse consequences would likely follow if a class member took this approach. *See Doe*, 372 F.3d at 1364. Indeed, a class member who refuses to work overtime could face formal discipline for insubordination. *See, e.g., Jackson v. Department of Justice*,

96 M.S.P.R. 498 (2004) (upholding removal of a DOJ employee under a "last-chance" agreement for declining to work previously unscheduled, mandatory overtime due to childcare obligations). In addition, even if the dispute does not result in imposition of formal discipline, there are numerous other actions an agency can take against an employee who refuses to work without pay.

The record evidence in this case shows that DOJ gave lower performance ratings and fewer performance awards to attorneys who declined to work uncompensated overtime, as well as less desirable assignments and fewer promotion opportunities. Our experience is similar: agency managers government-wide openly or informally and subtly penalize employees who decline to work uncompensated overtime. The converse is also true. Employees who work uncompensated overtime are rewarded with better performance appraisals, higher-profile work, more awards, and more promotions. These employees tend to receive other intangible benefits, as well, such as better office assignments, quick responses to equipment requests, and more cordial personal dealings with managers. All of this goes to show that a class member's decision whether to work uncompensated overtime significantly affects his or her working environment. It is therefore highly unpersuasive to suggest that the recourse for federal employees who do not want to volunteer their services is simply to decline to work uncompensated overtime.

Assuming that there are employees bold enough to take this path, the options for obtaining redress for the repercussions that would inevitably follow are quite limited. Only the most obvious and severe disciplinary acts can be appealed. Suspensions exceeding 14 days, removals, reductions in grade or pay, and furloughs of 30 days or less are subject to independent review under 5 U.S.C. § 7512. Independent review of performance-based removals or grade reductions is

available pursuant to 5 U.S.C. § 4303(e).[3] There is no avenue for DOJ attorneys to obtain independent review of any other repercussions.[4]

Moreover, even if the adverse consequences are concrete and so severe that they trigger the independent review provisions, the court of appeals offers no solace to employees who would risk a charge of insubordination or poor performance to avoid working uncompensated overtime. The best it can do is to speculate that an employee who declines to work uncompensated overtime "might" prevail when challenging the legality of the repercussions he or she suffers as a result. *See Doe*, 372 F.3d at 1364. The appeals court is correct to vacillate on the employees' prospects for success in light of the many daunting obstacles employees face any time they try to challenge disciplinary actions taken against them. The opportunity to pursue an appeal on which the employee "might" prevail offers little comfort to those who would consider taking this approach.

In light of the widely publicized expectations for DOJ attorneys held by the highest officials in the Department, the corresponding demanding nature of their jobs, and the specter of discipline or other adverse consequences for failure to meet those expectations, it is simply not realistic for the attorneys to decline to work uncompensated overtime. Their

---

[3] In the highly unlikely event that the retaliation constitutes a prohibited personnel practice (for example, if the agency targets an employee refusing to work uncompensated overtime for discriminatory reasons, or because of political cronyism or nepotism), the employee may file a complaint with the United States Office of Special Counsel. *See* 5 U.S.C. § 1212.

[4] Employees who are covered by a collective bargaining agreement may be able to pursue redress for a broader range of retaliatory actions through the negotiated grievance process. That is not an option for the DOJ attorneys who make up this class, however, as they are not covered by any such agreement.

only option is to put in whatever overtime hours are necessary to complete their assigned tasks in the timely and professional manner expected of them, even if they are not compensated for that time. The appeals court's decision gives management unfettered discretion to decide whether to approve any compensation for that work. That is surely not the scheme that Congress intended to create when it made overtime pay a statutory entitlement for virtually all federal employees.

C. The Appeals Court's Legal Errors Have a Substantial Impact on the Civil Service.

The legal errors committed by the appeals court have a major impact on the federal workplace. As shown in the petitioners' brief (at 28), there are nearly one million federal employees who rely on FEPA for overtime compensation and who are all vulnerable to the broad implications of the appeals court's decision. The decision allows federal agencies to circumvent the explicitly stated intent of Congress through the simple stratagem of adopting a policy pursuant to which written approval for overtime is never granted. This stratagem yields a windfall to the federal government: the appeals court has given it *carte blanche* to exploit its professional workforce by requiring untold hours of overtime work without compensation.

The appeals court's holding ratifies not only the policy within DOJ but the policies of other agencies as well. The Securities and Exchange Commission ("SEC"), for example, has formally adopted a policy of never ordering or approving overtime work for professional employees because they "are expected to have a sufficient interest in completing their work assignments on a timely basis or in keeping their workload reasonably current by performing voluntary work outside of regular work hours." *See* SEC, Personnel Operating Policies and Procedures, Ch. 630.B.4.A.1. This policy of "voluntary" overtime permits the SEC to require its professional staff to

work additional hours of uncompensated overtime when the Commission's workload so requires. This is exactly the situation FEPA was intended to prohibit. It would be unjust to allow a court decision that sanctions such ill treatment of the federal workforce to stand.

CONCLUSION

For the foregoing reasons and those set forth in the brief filed by the class, the unions respectfully request that the Court grant the petition for a writ of certiorari and reverse the appeals court's decision.

Respectfully submitted,

MARK D. ROTH
General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, NW
Washington, DC 20001
(202) 639-6415

SUSAN TSUI GRUNDMANN
General Counsel
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, FD1, IAMAW, AFL-CIO
1016 16th Street, NW
Washington, DC 20036
(202) 862-4457

GREGORY O'DUDEN *
General Counsel

BARBARA A. ATKIN
Deputy General Counsel

LARRY J. ADKINS
Deputy General Counsel

ROBERT H. SHRIVER, III
Assistant Counsel
NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, NW
Washington, DC 20006
(202) 572-5500

* Counsel of Record

February 2, 2005